

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JEFFERY MARTIN SIERZEGA, )

Plaintiff, )

v. )

PRO TEM JUDGE LYNN E. ASH- )

CROFT, JUDGE JOSEPH C. )

GUIMOND, JUDGE ALBIN W. NOR- )

BLAD, PRESIDING JUDGE PAUL J. )

LIPSCOMB, COURT REPORTER )

TRISHA ROHLFING, MARION COUNTY )

DEPUTY SHERIFF WELTY, MARION )

COUNTY DEPUTY SHERIFF DOUGALL, )

MARION COUNTY DEPUTY SHERIFF )

McDERMITT, MARION COUNTY )

DEPUTY SHERIFF BERNARD, SALEM )

POLICE DEPT. OFFICER ERIC )

MOFFITT, SALEM POLICE DEPT. )

CORPORAL J. HUMPHRIES, SALEM )

POLICE DEPT. CORPORAL M. SEY- )

FRIED, SALEM POLICE DEPT. SER- )

GEANT D. CARPENTER, IN THEIR )

OFFICIAL AND INDIVIDUAL CAPA- )

CITIES, MARION COUNTY, CITY )

OF SALEM, DR. JEFFREY )

PHILLIPS, DMD, JOHN/JANE DOE )

DEFENDANTS 1-4, )

Defendants. )

No. CV-05-1338-HU

FINDINGS & RECOMMENDATION

/ / /

/ / /

1 - FINDINGS & RECOMMENDATION

1 Jeffery Martin Sierzega  
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3 Plaintiff Pro Se

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13 Attorneys for Defendant Jeffrey C. Phillips, DMD

14 HUBEL, Magistrate Judge:

15 Plaintiff Jeffery Sierzega brings this civil rights action  
16 against several Marion County Circuit Court judges, a court  
17 reporter, several Marion County deputy sheriffs, several City of  
18 Salem police officers, Marion County, and the City of Salem. He  
19 also brings claims against a dentist, Dr. Jeffrey Phillips, DMD.

20 Presently, Phillips, the Marion County judges, and the court  
21 reporter move to dismiss the claims against them. I recommend that  
22 Phillips's motion be denied, and that the separate motion by the  
23 judicial officers and the court reporter be granted in part and  
24 denied in part.

25 BACKGROUND

26 Plaintiff's lengthy Amended Complaint begins with allegations  
27 that in August 2005, he contacted Phillips by telephone to obtain  
28

2 - FINDINGS & RECOMMENDATION

1 information regarding treatment that Phillips had provided to  
2 plaintiff's child. Am. Compl. at ¶ 21. Plaintiff contends that  
3 Phillips then conspired with defendant police officer Seyfried and  
4 his superiors with the Salem Police Department, to fabricate facts  
5 constituting probable cause to support the issuance of an Oregon  
6 Uniform Stalking Citation against plaintiff. Id. at ¶ 22.

7 Plaintiff states that the stalking citation was served on him  
8 on August 9, 2005, and that Seyfried and defendant police officer  
9 Carpenter knowingly and intentionally misinformed plaintiff that he  
10 was required to make a personal appearance on August 12, 2005, to  
11 answer the citation. Id. at ¶¶ 24, 25.

12 Plaintiff contends that on August 12, 2005, he personally  
13 appeared at 11:30 a.m. as specified in the stalking citation only  
14 to be advised by defendant court reporter Rohlfing to make an  
15 appearance at 1:30 p.m. instead. Id. at ¶ 29. He states that he  
16 filed a motion "for change of judge" while waiting for the 1:30  
17 p.m. hearing, based on his "reasonable belief that he cannot have  
18 a fair or impartial hearing before any judge whose identity is  
19 being kept a secret from him by the trial court." Id. at ¶ 30.

20 Plaintiff alleges that he provided defendant Pro Tem Judge  
21 Ashcroft with a certified, file- and date-stamped copy of the  
22 recusal motion when the 1:30 hearing began, but Judge Ashcroft did  
23 not recuse himself. Id. at ¶ 31.

24 Plaintiff states that Judge Ashcroft and defendant Presiding  
25 Judge Lipscomb then arranged with defendants sheriff deputies Welty  
26 and Dougall, before the hearing began, to have plaintiff handcuffed  
27 and removed from the courtroom during a twenty-minute recess. Id.  
28 at ¶ 32. Next, according to plaintiff, Judge Ashcroft then ordered

1 plaintiff's handcuffs removed and gave plaintiff a written  
2 assignment for a hearing before defendant Judge Norblad on August  
3 30, 2005. Id. at ¶ 33. Judge Ashcroft also allegedly gave  
4 plaintiff a Temporary Stalking Protective Order. Id. at ¶ 34. The  
5 temporary order allegedly bears the signature of defendant Judge  
6 Guimond. Id. at ¶ 35. Plaintiff contends that Judge Ashcroft  
7 forged Judge Guimond's signature with Judge Lipscomb's permission  
8 during the recess called by Judge Ashcroft. Id. He further  
9 contends that Judge Ashcroft signed Judge Guimond's name on the  
10 order with Rohlfing's pen. Id. He also contends that Rohlfing  
11 tampered with the taped transcript of the proceedings and deleted  
12 three large sections of tape containing incriminating language  
13 spoken by Judge Ashcroft. Id.

14 Shortly thereafter, plaintiff filed a motion to recuse Judge  
15 Norblad and then filed a request for access to his case file. Id.  
16 at ¶¶ 37, 38. He also subpoenaed certain records from the City of  
17 Salem's Chief of Police. Id. at ¶ 39. The City moved to quash the  
18 subpoena. Id. Plaintiff then filed a motion to vacate, amend, and  
19 dismiss the temporary stalking order "purportedly signed by" Judge  
20 Guimond on August 12, 2005. Id. at ¶ 41.

21 On August 30, 2005, plaintiff appeared before Judge Norblad.  
22 Id. at ¶ 42. Judge Norblad was then apprised of the recusal  
23 motion. Id. at ¶ 44. He allegedly allowed the motion and  
24 "order[ed] plaintiff to wait out in the hall while another judge is  
25 assigned to plaintiff's case and another hearing is scheduled  
26 [sic]." Id.

27 Apparently, after waiting for ten minutes, plaintiff and his  
28 witnesses decided to leave. Id. at ¶ 45. As plaintiff and his

1 mother were driving home, "their vehicle [was] blocked" by  
2 defendants sheriff deputies Bernard and McDermitt who ordered  
3 plaintiff to accompany them back to the courthouse. Id. at ¶ 46.  
4 Upon his return to the courthouse, Judge Norblad allegedly informed  
5 plaintiff that Judge Lipscomb had assigned the case to himself and  
6 would conduct a hearing that morning. Id. at ¶ 47.

7 At the beginning of the hearing before Judge Lipscomb,  
8 plaintiff informed Judge Lipscomb that the previous day, plaintiff  
9 had filed this civil rights action against Judge Lipscomb. Id. at  
10 ¶ 49. Judge Lipscomb allegedly denied plaintiff's request that  
11 Judge Lipscomb disqualify himself from hearing the case. Id.

12 Plaintiff alleges that in the stalking order proceeding, the  
13 police reports and sworn statements by Phillips were perjured and  
14 fail to constitute probable cause. Id. at ¶ 52. He further  
15 contends that he was not allowed to cross-examine Phillips or to  
16 call any witnesses to testify on his behalf. Id. at ¶ 53.  
17 Nonetheless, plaintiff contends that Judge Lipscomb vacated the  
18 orders purportedly entered by Judge Guimond. Id. at ¶ 56.

19 Plaintiff states that he was ordered to submit to a mental  
20 health evaluation by a health-care provider of his own choice  
21 within ten days and that "the PSPO" (which I understand to be a  
22 permanent stalking order), be entered. Id. at ¶ 58. Plaintiff  
23 further states that on September 9, 2005, he filed proof of  
24 compliance with the order regarding the mental health evaluation.  
25 Id. at ¶ 62. Later in September, plaintiff moved to modify the  
26 PSPO to allow service of a Notice of Appeal on Phillips. Id. at ¶  
27 62.

28 On September 26, 2005, Judge Lipscomb recused himself from the

1 case and assigned Judge Ochoa to the case for the hearing on the  
2 motion to modify. Id. at ¶ 63. On October 5, 2005, plaintiff  
3 alleges that the Court Records Division of the Oregon Court of  
4 Appeals "fabricate[d] the date of filing of plaintiff's timely  
5 filed Notice of Appeal as 5 October 2005 instead of 29 September  
6 2005[,]" and sent plaintiff a letter assigning plaintiff an  
7 appellate case number and giving plaintiff fourteen days to file  
8 proof of service of the Notice of Appeal on Phillips. Id. at ¶ 65.

9 Also on October 5, 2005, plaintiff alleges that Oregon Court  
10 of Appeals Judge Mary Deits entered an order "dismissing  
11 plaintiff's appeal as being untimely filed with no showing that  
12 plaintiff's Notice of Appeal was not filed on 29 September 2005. "  
13 Id. at ¶ 66.

14 Plaintiff contends that his request for a copy of the taped  
15 transcript of the proceedings held August 12, 2005, and August 30,  
16 2005, was denied, based on a standing order of Judge Lipscomb's to  
17 the effect that the written transcript, when certified by the court  
18 reporter, is the official record, and that the original recording  
19 is not provided to anyone except officers of the court, with a  
20 further restriction that no further or unauthorized copying will be  
21 allowed. Id. at ¶ 67.

#### 22 STANDARDS

23 On a motion to dismiss, the court must review the sufficiency  
24 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).  
25 The court should construe the complaint most favorably to the  
26 pleader:

27 In appraising the sufficiency of the complaint, we  
28 follow, of course, the accepted rule that the complaint  
should not be dismissed for failure to state a claim

1 unless it appears beyond doubt that the plaintiff can  
 2 prove no set of facts in support of his claim which would  
 entitle him to relief.

3 Conley v. Gibson, 355 U.S. 41, 45-46 (1957); American Family Ass'n,  
 4 Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th  
 5 Cir. 2002). The allegations of material fact must be taken as  
 6 true. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994). However,  
 7 the court need not accept conclusory allegations as truthful.  
 8 Holden v Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

#### 9 DISCUSSION

10 Based on the facts as outlined above, plaintiff brings the  
 11 following claims: (1) "Count I": a claim under 42 U.S.C. § 1983  
 12 for conspiracy to maliciously prosecute; Am. Compl. at ¶¶ 73-77;  
 13 (2) "Count II": a claim under 42 U.S.C. § 1983 for violation of  
 14 equal protection of the laws; Am. Compl. at ¶¶ 78-80; (3) "Count  
 15 III": a claim under 42 U.S.C. § 1983 for unlawful arrest, search,  
 16 and seizure; Am. Compl. at ¶¶ 81-86; (4) "Count IV": a claim under  
 17 42 U.S.C. § 1983 for conspiracy to maliciously abuse process; Am.  
 18 Compl. at ¶¶ 86-90; (5) "Count V": a claim under 42 U.S.C. § 1983  
 19 for violation of the right to a fair and impartial hearing; Am.  
 20 Compl. at ¶¶ 91-97; (6) "Count VI": a claim under 42 U.S.C. § 1983  
 21 for unlawful arrest, seizure, and detention; Am. Compl. at ¶¶ 98-  
 22 104; and (7) "Count VII": claims for forgery, abuse of process,  
 23 malicious prosecution, and tampering with court records. Am.  
 24 Compl. at ¶¶ 105-112. Additionally, plaintiff "reserves" several  
 25 "counts" for other claims such as intentional infliction of  
 26 emotional distress, negligence, and false arrest, seizure, and  
 27 detention. Am. Compl. at p. 21.

28 / / /

7 - FINDINGS & RECOMMENDATION

I. Phillips's Motion to Dismiss

Phillips moves to dismiss Counts I - VI for failure to state a claim, and to dismiss Count VII for lack of jurisdiction.

A. Counts I - VI

These "counts" are all brought under section 1983. To establish a violation of section 1983, plaintiff must prove that defendants acted under color of state law and deprived plaintiff of a federal constitutional or statutory right. Dawson v. City of Seattle, 435 F.3d 1054, 1061 (9th Cir. 2006); Henderson v. City of Simi Valley, 305 F.3d 1052, 1056 (9th Cir. 2002). Section 1983 "is the vehicle whereby plaintiffs can challenge actions by governmental officials." Henderson, 305 F.3d at 1056.

Phillips moves to dismiss the section 1983 claims against him because plaintiff fails to allege that he was employed by the Marion County Sheriff's Department, the Salem Police Department, or the State of Oregon in any capacity.<sup>1</sup> Phillips further notes that plaintiff has failed to allege that Phillips acted under the color of state law.

Plaintiff alleges that Phillips is a pediatric dentist. Am. Compl. at ¶ 19. The Amended Complaint contains no allegations

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<sup>1</sup> Phillips inappropriately frames his argument as one based on the fact that he was never employed by Marion County, the City of Salem, or the State of Oregon. He goes so far as to submit an affidavit attesting to the fact of his non-employment with these entities. On a Rule 12(b)(6) motion, the only relevant facts are what are pleaded in the Complaint or Amended Complaint. Thus, whether Phillips was or is employed by any of the three governmental bodies who are defendants in this case is beside the point. At this stage of the case, it is only what plaintiff has alleged that matters. Moreover, because my analysis of the motion is confined to the allegations in the Amended Complaint, I disregard Phillips's affidavit.



1 capable of suggesting that Phillips is a government official.  
2 Additionally, there is no allegation that Phillips acted under  
3 color of state law.

4 In response to the motion, plaintiff notes that he has alleged  
5 that Phillips conspired with the other named defendants to deprive  
6 him of his constitutional rights. Specifically, he refers to his  
7 allegations that Phillips supplied perjured sworn statements to  
8 City of Salem police officers to "fabricate evidence in their  
9 attempts to manufacture probable cause" for the issuance of the  
10 stalking citations against plaintiff. Pltf's Opp. Mem. at p. 2.

11 The relevant facts as alleged in the Amended Complaint are  
12 that "[o]n 7 August 2005 defendant Phillips conspired with  
13 defendant Cpl. M. Seyfried and his superiors at Salem Police Dept.  
14 to fabricate probable cause for the issuance of a fraudulent Oregon  
15 Uniform Stalking Citation against plaintiff based on the perjured  
16 sworn statements of defendant Phillips and the falsified police  
17 reports of defendants SPD Cpl. J. Humphries, Off. C. Moffitt, Cpl.  
18 M. Seyfried, and Sgt. D. Carpenter[.]" Am. Compl. at ¶ 22.

19 "Count I," alleging a conspiracy to maliciously prosecute, is  
20 the only "count" mentioning Phillips. There, plaintiff alleges  
21 that

22 [d]efendants acted in concert under color of state law in  
23 their official and individual capacities and under the  
24 direction and control of defendant employers City of  
25 Salem and Marion County, with malice and intent, to  
26 maliciously prosecute plaintiff for stalking with the  
27 ulterior purpose of immunizing defendant Dr. Jeffrey  
28 Phillips from suit through the "no contact" provisions of  
a stalking citation and temporary and permanent stalking  
protective orders that prohibit any contact by plaintiff  
with defendant Phillips under threat of felony  
prosecution and for which plaintiff has no remedy under  
state law.

1 Id. at ¶ 73.

2 Plaintiff then contends that "[a]ll the defendants" had an  
3 object to be accomplished, had an agreement on the object or course  
4 of action, performed one or more unlawful overt acts, and caused  
5 plaintiff damages that were a direct result of those unlawful overt  
6 acts. Id. at ¶ 74. Plaintiff alleges that the overt acts  
7 included, but were not limited to (1) fabricating probable cause  
8 for the issuance of the stalking citations, and the temporary and  
9 permanent stalking protective orders against plaintiff; (2) forging  
10 signatures of a circuit court judge; and (3) subjecting plaintiff  
11 to warrantless, unreasonable, and false arrests, searches,  
12 seizures, and detentions on three occasions. Id. at ¶ 75.

13 Although there are no allegations supporting Phillips's status  
14 as a government actor, "[p]rivate persons, jointly engaged with  
15 state officials in the challenged action, are acting 'under color'  
16 of law for purposes of § 1983 actions." Collins v. Womancare, 878  
17 F.2d 1145, 1154 (9th Cir. 1989) (internal quotation omitted).  
18 "Private parties act under color of state law if they willfully  
19 participate in joint action with state officials to deprive others  
20 of constitutional rights." United Steelworkers of Am. v. Phelps  
21 Dodge Corp., 865 F.2d 1539, 1540 (9th Cir. 1989). "Private parties  
22 involved in such a conspiracy may be liable under section 1983."  
23 Id.

24 Phillips recognizes that a private individual jointly engaged  
25 with state officials may be acting under color of state law for  
26 purposes of a section 1983 claim. But, Phillips argues that more  
27 than "vague and conclusory" allegations are required. In support,  
28 Phillips cites Dennis v. Sparks, 449 U.S. 24 (1980), and Ivey v.

1 Board of Regents of the Univ. of Alaska, 673 F.2d 266 (1982).

2 Dennis is not on point. The case primarily stands for the  
3 proposition that private parties who are alleged to have conspired  
4 with a government official to deprive a person of his or her  
5 constitutional rights, may maintain the claim against the private  
6 parties even when the government official's actions are protected  
7 by judicial immunity. Dennis, 449 U.S. at 27-28. The case says  
8 nothing about vague and conclusory allegations. The Court did note  
9 that "merely resorting to the courts and being on the winning side  
10 of a lawsuit does not make a party a co-conspirator or a joint  
11 actor with the judge[;]" but, the Court continued, the allegations  
12 brought by the plaintiff in Dennis were that "an official act of  
13 the defendant judge was the product of a corrupt conspiracy  
14 involving bribery of the judge." Id. at 28. This was sufficient.

15 Ivey is on point, but it is distinguishable. There, the court  
16 first recognized its duty to liberally interpret a pro se civil  
17 rights complaint. Ivey, 673 F.2d at 268. Even so, the court  
18 explained, such an interpretation "may not supply essential  
19 elements of the claim that were not initially pled." Id. The  
20 court stated that "[v]ague and conclusory allegations of official  
21 participation in civil rights violations are not sufficient to  
22 withstand a motion to dismiss." Id. Because the complaint was  
23 "devoid of specific factual allegations showing the . . .  
24 defendants' participation in the alleged discriminatory employment  
25 practice[,]" the plaintiff had failed to state a claim under  
26 section 1983. Id.

27 Ivey is distinguishable because plaintiff here does allege  
28 specific facts in support of his section 1983 conspiracy claim. As

1 noted above, he contends that Phillips perjured himself in sworn  
2 statements given in support of the stalking citation. He goes on  
3 to allege specific actions of other actors that were allegedly part  
4 of the conspiracy. In contrast to Ivey, the Amended Complaint here  
5 contains more than a bare allegation of conspiracy. See Johnson v.  
6 State of Calif., 207 F.3d 650, 655 (9th Cir. 2000) (district court  
7 erred in dismissing section 1985(3) claim with prejudice because it  
8 contained more than bare allegation of conspiracy and additional  
9 facts in support of the alleged conspiracy may develop as the  
10 plaintiff proceeded with discovery).

11 It is clear that merely complaining to the police does not  
12 convert a private party into a state actor. Collins, 878 F.2d at  
13 1155 (noting also that execution by a private party of a sworn  
14 complaint which forms the basis of an arrest is not enough to  
15 convert the private party's acts into state action). However, the  
16 allegations in this case go further than Phillips making a report  
17 to the police. Because of the specific factual allegations made in  
18 support of the conspiracy claim, and because Phillips is alleged to  
19 have conspired with government officials by intentionally providing  
20 false sworn statements, plaintiff has adequately stated a  
21 conspiracy claim for the purposes of a Rule 12(b)(6) motion,  
22 against Phillips.

23 I recommend that Phillip's motion to dismiss Counts I-VI be  
24 denied.

#### 25 B. Count VII - Supplemental State Law Claims

26 Phillips moves to dismiss the supplemental state law claims,  
27 grouped together as "Count VII" in the Amended Complaint, because  
28 without any federal claims remaining against Phillips, there is no

1 independent basis for jurisdiction over these claims. 28 U.S.C. §  
2 1367. Because I recommend that the federal section 1983 claims not  
3 be dismissed at this time, I recommend that the motion to dismiss  
4 the state supplemental claims alleged in Count VII, also be denied.

5 II. State Defendants' Motion to Dismiss

6 Defendants Lipscomb, Guimond, Ashcroft, Norblad, and Rohlfing  
7 move to dismiss all claims against them on the basis of judicial  
8 immunity. They alternatively move to dismiss the state  
9 supplemental claims raised in Count VII as barred by the Eleventh  
10 Amendment.

11 A. Judicial Immunity

12 1. Ashcroft, Guimond, Norblad, and Lipscomb

13 "The doctrine of judicial immunity is supported by a long-  
14 settled understanding that the independent and impartial exercise  
15 of judgment vital to the judiciary might be impaired by exposure to  
16 potential liability." Antoine v. Byers & Anderson, Inc., 508 U.S.  
17 429, 435 (1993). The doctrine discourages collateral attacks on  
18 judges and defers to the appellate process for the correction of  
19 judicial error. In re Castillo, 297 F.3d 940, 947 (9th Cir. 2002).  
20 "[J]udges defending against § 1983 actions enjoy absolute immunity  
21 from damages liability for acts performed in their judicial  
22 capacities[.]" Dennis, 449 U.S. at 27 (internal quotation  
23 omitted).

24 "A judge is absolutely immune from liability for his judicial  
25 acts even if his exercise of authority is flawed by the commission  
26 of grave procedural errors." Stump v. Sparkman, 435 U.S. 349, 359  
27 (1978). "This absolute immunity insulates judges from charges of  
28 erroneous acts or irregular action, even when it is alleged that

1 such action was driven by malicious or corrupt motives[.]"  
2 Castillo, 297 F.3d at 947. Moreover, even where a judge acts in  
3 excess of judicial authority, he or she is not deprived of  
4 immunity. Moore v. Brewster, 96 F.3d 1240, 1244 (9th Cir. 1996).

5 The judicial officer defendants argue that judicial immunity  
6 extends to all their alleged actions outlined in the Amended  
7 Complaint. Although plaintiff alleges that they acted maliciously  
8 and improperly, they contend that all of the claims are based on  
9 actions they took in deciding and handling matters that were in  
10 front of them as judges and thus, they are entitled to absolute  
11 immunity.

12 In response to the motion, plaintiff contends that immunity  
13 does not apply because he brings these claims against the judicial  
14 officer defendants in their individual capacities as well as their  
15 official capacities, and because the judicial officer defendants  
16 acted in the absence of jurisdiction. Neither of plaintiff's  
17 arguments has merit.

18 First, the capacity in which the individual is sued is  
19 different from the capacity in which a person's actions were taken.  
20 See Hafer v. Melo, 502 U.S. 21, 26-27 (1991) ("the phrase 'acting  
21 in their official capacities' is best understood as a reference to  
22 the capacity in which the state officer is sued, not the capacity  
23 in which the officer inflicts the alleged injury").

24 Second, all of the alleged actions taken by these defendants  
25 as raised in the Amended Complaint, fall within their roles as  
26 judges. All of the alleged improper actions occurred while the  
27 judicial officer defendant was performing the normal judicial  
28 function of presiding over a case then assigned to that judge or

1 that judge's court. See Ashelman v. Pope, 793 F.2d 1072, 1075-76  
2 (9th Cir. 1986) (outlining criteria for evaluating whether a given  
3 action is judicial in nature). While the law recognizes that "'a  
4 judge is not immune for actions, though judicial in nature, taken  
5 in the complete absence of all jurisdiction[,]" Meek v. County of  
6 Riverside, 183 F.3d 962, 965 (9th Cir. 1999) (quoting Mireles v.  
7 Waco, 502 U.S. 9, 11-12 (1991)), none of the allegations in  
8 plaintiff's Amended Complaint are capable of suggesting that any of  
9 the judicial officer defendants were acting without jurisdiction.

10 I recommend that the judicial officer defendants' motion to  
11 dismiss all claims against them, be granted.

## 12 2. Rohlfig

13 As noted above, Rohlfig is a court reporter who allegedly  
14 told plaintiff to re-appear at 1:30 p.m. on August 12, 2005, when  
15 he appeared at 11:30 a.m., and who also allegedly erased portions  
16 of the taped transcript of the August 12, 2005 hearing before Judge  
17 Ashcroft. Am. Compl. at ¶¶ 29, 35.

18 Under the doctrine of absolute "quasi-judicial immunity," the  
19 doctrine of judicial immunity, as described above, is extended to  
20 those who "perform functions closely associated with the judicial  
21 process[,]" or those who have a "sufficiently close nexus with the  
22 adjudicative process[.]" Castillo, 297 F.3d at 948 (internal  
23 quotation omitted).

24 The application of the doctrine does not depend on the job  
25 title of the defendant, but instead, requires an analysis of the  
26 function or act allegedly performed. Id. (noting that "to  
27 determine whether a nonjudicial officer is entitled to absolute  
28 quasi-judicial immunity, courts must look to the nature of the

1 function performed and not to the identity of the actor performing  
2 it."). As explained by the Supreme Court, "[w]hen judicial  
3 immunity is extended to officials other than judges, it is because  
4 their judgments are functionally comparable to those of judges --  
5 that is, because they, too, exercise a discretionary judgment as  
6 part of their function." Antoine, 508 U.S. at 436 (internal  
7 quotation and brackets omitted).

8 At issue in this case is Rohlfig's giving plaintiff  
9 scheduling information regarding the time of his hearing and  
10 allegedly tampering with the tape recording of the August 12, 2005  
11 proceedings before Judge Ashcroft and omitting that portion from  
12 the final, written transcript.

13 As to the scheduling information, Rohlfig is entitled to  
14 quasi-judicial immunity for this function. See Rodriguez v.  
15 Weprin, 116 F.3d 62, 66 (2d Cir. 1997) (court clerk entitled to  
16 quasi-judicial immunity for allegedly failing to properly manage  
17 the court's calendar; court noted that "[a] court's inherent power  
18 to control its docket is part of its function of resolving disputes  
19 between parties. This is a function for which judges and their  
20 supporting staff are afforded absolute immunity."); Moore, 96 F.3d  
21 at 1244 (Clerk of the court performed quasi-judicial functions as  
22 to which he was entitled to absolute immunity); Wagshal v. Foster,  
23 28 F.3d 1249, 1252 (D.C. Cir. 1994) (court's "case evaluator"  
24 performs judicial functions such as identifying factual and legal  
25 issues, scheduling discovery and motions with the parties, and  
26 coordinating settlement efforts).

27 I reject the assertion, however, that Rohlfig is entitled to  
28 absolute quasi-judicial immunity for her alleged actions in regard



1 to the transcript of the August 12, 2005 hearing before Judge  
2 Ashcroft.

3 In Antoine, the plaintiff brought a section 1983 claim against  
4 a court reporter who failed to deliver a complete transcript of a  
5 criminal trial on appeal. Although the Ninth Circuit held that the  
6 making of an official record of a court proceeding was part of the  
7 judicial function, the Supreme Court reversed. The Supreme Court  
8 first noted that "[c]ourt reporters were not among the class of  
9 person protected by judicial immunity in the 19th century." 508  
10 U.S. at 433. The Court also rejected the notion that court  
11 reporters served as the functional equivalents of "common-law  
12 judges who made handwritten notes during trials." Id. at 434.

13 After explaining the relevant analysis, quoted above, that  
14 judicial immunity is extended to non-judicial officers when the  
15 actions at issue are "functionally comparable" to those of judges,  
16 because they "exercise a discretionary judgment" as part of the  
17 function, the Court then held that "[t]he function performed by  
18 court reporters is not in this category." Id. at 436. The Court  
19 remarked that court reporters are required by statute to "'record  
20 verbatim' court proceedings in their entirety." Id. (quoting 28  
21 U.S.C. § 753(b)). Court reporters "are afforded no discretion in  
22 the carrying out of this duty; they are to record, as accurately as  
23 possible, what transpires in court." Id.

24 Although the state law applicable to Rohlfing does not contain  
25 the "record verbatim" language of the federal Court Reporter's Act,  
26 it does, like the federal law, provide for no discretion. Under  
27 Oregon law, a reporter must take accurate notes by shorthand or by  
28 means of a mechanical or electronic typing device, or make audio

1 records, of the oral testimony and other proceedings of the trial  
2 or hearing to the extent required by the court or by the requesting  
3 party. Or. Rev. Stat. § (O.R.S.) 8.340(4), (5). When such a  
4 record has been made, "if the court or either party . . . requests  
5 a transcript of the notes or audio records into longhand, the  
6 official reporter shall cause full and accurate typewritten  
7 transcripts to be made of the testimony or other proceedings[.]"  
8 O.R.S. 8.350 (emphasis added).

9 Based on the relevant state law and Antoine, Rohlfing is not  
10 entitled to absolute immunity for her alleged actions of erasing  
11 and/or failing to transcribe portions of the audio record of the  
12 August 12, 2005 proceedings before Judge Ashcroft. I recommend  
13 that Rohlfing's motion to dismiss, based on quasi-judicial  
14 immunity, be denied.

15 B. Eleventh Amendment

16 The judicial officer defendants and Rohlfing argue that  
17 plaintiff's Count VII supplemental state common-law claims should  
18 be dismissed because the Eleventh Amendment bars state law claims  
19 brought in federal court against a state which has not waived its  
20 immunity from suit in federal court.

21 The Eleventh Amendment bars claims in federal court against  
22 state officials based on state law violations. Pennhurst State  
23 Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 121-22 (1984). This  
24 includes state law claims in federal court based on supplemental  
25 (formerly pendent), jurisdiction. Id. (the principle that a claim  
26 that state officials violated state law in carrying out their  
27 official responsibilities is a claim against the State that is  
28 protected by the Eleventh Amendment applies as well to state-law

1 claims brought into federal court under pendent jurisdiction).

2 The Eleventh Amendment immunity from suit extends to state  
3 agencies and officers. Sofamor Danek Group, Inc. v. Brown, 124  
4 F.3d 1179, 1183 (9th Cir. 1997). The problem with defendants'  
5 argument, however, is that the immunity does not extend to claims  
6 brought against state officials in their individual or personal  
7 capacities. Pena v. Gardner, 976 F.2d 469, 473-74 (9th Cir. 1992)  
8 ("the eleventh amendment will not bar pendent state claims by [the  
9 plaintiff] against state officials acting in their individual  
10 capacities.").

11 Because the judicial officers enjoy absolute judicial immunity  
12 for their alleged actions, I discuss only the allegations regarding  
13 Rohlfing's official and individual capacity status. The Amended  
14 Complaint is not clear regarding the capacity in which she is sued.  
15 In the second full paragraph of the Amended Complaint, plaintiff  
16 alleges that the defendant state court judges "are sued in their  
17 official and individual capacities." Am. Compl. at p. 2.  
18 Plaintiff then alleges that Phillips is sued in his individual  
19 capacity. Id. No mention is made of Rohlfing.

20 Because I must give this pro se pleading a liberal  
21 construction, because generally, plaintiff appears to indicate that  
22 Rohlfing is to be considered as part of a group with the judicial  
23 officer defendants, and because the Amended Complaint is silent  
24 regarding the capacity in which Rohlfing is sued, I construe the  
25 Amended Complaint to allege that she is sued in both her official  
26 and individual capacities. As such, the motion, based on the  
27 Eleventh Amendment, should be granted to the extent that she is  
28 sued in her official capacity, but should be denied to the extent

1 she is sued in her individual or personal capacity.

2 CONCLUSION

3 Phillips's motion to dismiss (#32) should be denied. The  
4 state defendants' motion to dismiss (#30) should be granted in part  
5 and denied in part.

6 SCHEDULING ORDER

7 The above Findings and Recommendation will be referred to a  
8 United States District Judge for review. Objections, if any, are  
9 due April 27, 2006. If no objections are filed, review of the  
10 Findings and Recommendation will go under advisement on that date.

11 If objections are filed, a response to the objections is due  
12 May 11, 2006, and the review of the Findings and Recommendation  
13 will go under advisement on that date.

14 IT IS SO ORDERED.

15 Dated this 12th day of April, 2006.

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18 /s/ Dennis James Hubel  
19 Dennis James Hubel  
United States Magistrate Judge  
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